

No 796 (19)

No. 35946.

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Supreme Court of the United States

J. W. HALL, APPELLEE,

VS.

CHARLES B. EELLS, APPELLANT.

APPEAL FROM THE DISTRICT COURT OF LINN COUNTY,
KANSAS.

HONORABLE HARRY W. FISHER, JUDGE.

PETITION FOR WRIT OF CERTIORARI.

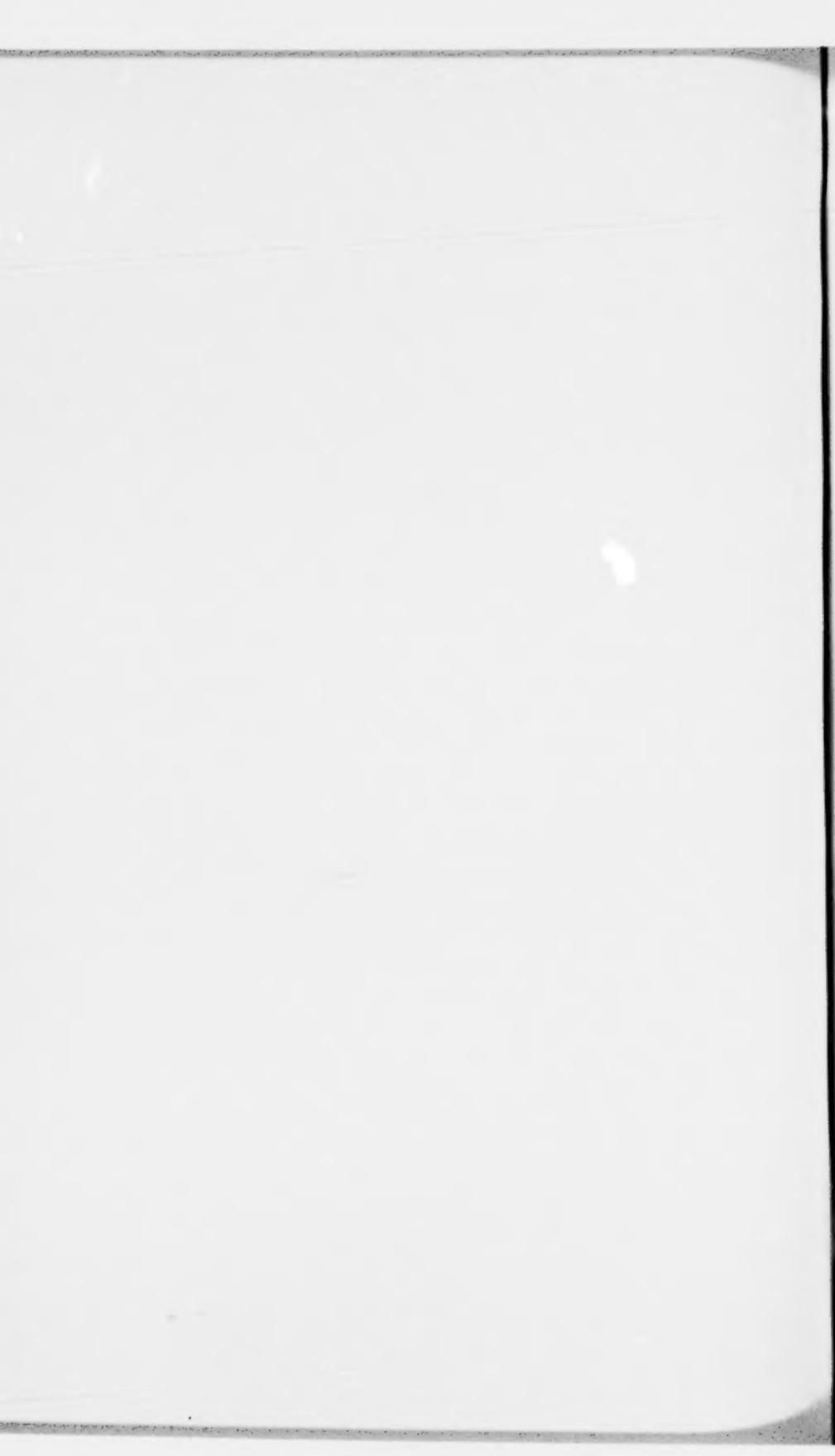
CHARLES B. EELLS,

Appellant.



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PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice and Associated Justices
of the Supreme Court of the United States of America:

Your petitioner, Charles B. Eells, respectfully prays
for a writ of certiorari herein to review a certain final
decision of the Supreme Court of the State of Kansas,
being the highest court in said state, in the above en-
titled action, the opinion and decision of said court hav-
ing been rendered and filed November 6, 1943, after being
entertained and considered by said court, by which said
decision the court held that the case be dismissed. A
petition and motion filed by your petitioner to reinstate
said case was denied on December 21, 1943.

This matter is an appeal from the Linn County, Kansas, District Court overruling defendant's motion to set aside as wholly void an injunction for reasons set out in said motion, pages 1 to 17 in appellant's abstract, and involves the foreclosure of a mortgage in 1932 on certain realestate located in Linn County, Kansas, by a fictitious person in the name of J. W. Hall, a resident of Jackson County, Missouri, whose postoffice address is Commerce Building, Kansas City, Missouri.

Your petitioner held possession of said realestate for seven years thereafter and until the present injunction action was brought in 1939. In the meantime a J. W. Hall, of Jackson County, Missouri, gave a quit-claim deed to the land in question.

This present case was brought by a J. W. Hall, of 1121 Pacific Street, Kansas City, Kansas, who, by his affidavit, has resided in the State of Kansas the past thirty years and who has established no claim whatever as being in any manner an interested party in said realestate or in the foreclosure proceedings.

The Linn County, Kansas, District Court, however, granted a temporary injunction to said party without permitting either party to be heard and without requiring a bond of plaintiff contrary to the Kansas Statutes which make the giving of an undertaking a prerequisite to the granting of a temporary injunction. Ten days later the said district court perpetuated the injunction. Nine months thereafter the respondent accused your petitioner of violating the *temporary* injunction which had already been dissolved by the further order of the court, and the said district court ordered the petitioner into the custody of the sheriff of Linn County, Kansas, for violating the *permanent* injunction of which he has never been legally accused, thereby depriving him of his liberty and property without due process or protection of law.

The basis upon which your petitioner contends this Honorable Court has jurisdiction is, in the first place, that it is an action between citizens of different states as provided by Article III, Section 2 of the Constitution of the United States, and in the second and most important place, the State of Kansas has deprived him of his liberty and property without due process or protection of law, the prohibition of which is provided by the fourteenth amendment to the Constitution of the United States.

The fact that the parties to this action are citizens of different states was brought up in the court of the first instance when the plaintiff in his petition states "That he is a resident of Wyandotte County, Kansas, and that the defendant is a resident of Jackson County, Missouri," and was brought up again in defendant's motion to set aside the injunction as void as set out in question No. 1 in his abstract, pages 2 to 4. Since neither your petitioner nor his counsel were permitted to be heard at the hearing in the court of the first instance, the contention that the defendant was deprived of his property and liberty without due process of law, was brought up in his motion in said court to vacate the injunction as wholly void as set out in question No. 5 of his abstract, pages 9 to 11 and also under question No. 7, pages 12 to 15 of his abstract. This same contention was brought up again in the Kansas Supreme Court in appellant's motion filed in time, to reinstate said case when he says near the close of said motion under No. 3:

"The above captioned case should be reinstated and all orders and judgments rendered therein by the district court should be set aside vacated for the further reason that, in violation of the Federal Constitution and the Statutes of the State of Kansas, they deprive the appellant of his property and liberty without due process of law. As yet no court has cited laws or authorities to refute the appellant's claims."

The first question we wish this Honorable Court to review, if it finds it has jurisdiction, is that the respondent, being a citizen of the State of Kansas for the past thirty years brought an injunction action against your petitioner, a citizen of the State of Missouri, enjoining said petitioner from interfering with the possession of that certain tract of real estate located in Linn County, Kansas, to which the petitioner held and still holds legal title as reflected by the records of Linn County, Kansas.

The respondent bases his right for said injunction on the prior action foreclosing said mortgage which was brought, not by him but by a J. W. Hall, a citizen of the state of Missouri. The respondent is, therefore, not the real party in interest. This question is fully set out in appellant's abstract under Question No. 1 pages 2, 3 and 4, and further discussed on page 16.

The second question involved is that a legal trial was not held in the Linn County, Kansas, District Court. The district judge ordered his clerk not to issue subpoenas for papers and witnesses called for by defendant on his praecipe. This question is fully set out under Question No. 3 of appellant's abstract, pages 5 and 6. Concerning said praecipe and lack of evidence see appellant's abstract pages 21 and 22.

The third question we wish this Honorable Court to review is that an attempted assignment of the mortgage to some J. W. Hall is null and void for the reason the assignment does not identify the assignee nor is the corporate seal of the Commerce Trust Company affixed as required by law. No authority, therefore, has been conferred on the respondent to bring this action. The question is fully set out under Question No. 4 in appellant's abstract pages 6 to 9.

The Fourth question we wish this Honorable Court to review is the fact that your petitioner was ordered

into the custody of the sheriff of Linn County, Kansas, for violating a permanent injunction, of which he has not been legally accused and without due process of law. This question is discussed fully under question No. 5, pages 9, 10 and 11 in his abstract.

The Fifth question we wish reviewed is that the temporary injunction was perpetuated in the court of the first instance eight days after it became effective, thereby depriving the petitioner of his legal right to appeal or prepare to defend himself. This question is set forth in his abstract under question No. 6, pages 11 and 12.

While not insisting on the review of the question of the failure of the district court to demand an undertaking of the plaintiff as required by law as set out in question No. 7 of our abstract, pages 12 to 15, yet a perusal of said question will show the gross injustice, prejudice and disregard of the Kansas Statutes by both the court of the first instance and the Kansas Supreme Court. It will be noted that this question was the sole and only one raised in the previous appeal No. 35480, 155 Kan. 307, 124 Pac. 2d 444.

The reasons relied on for the allowance of this writ are:

1. That the Supreme Court of the United States has jurisdiction over the parties to this action, since they are citizens of different states.
2. That, contrary to the fourteenth amendment to the Constitution of the United States, the petitioner has been deprived of his property and liberty without due process of law by the State of Kansas through its courts in an action brought against him by a party with no legal status or capacity to bring said action.

Wherefore, your petitioner respectfully asks this Honorable Court to allow the writ of certiorari.

Charles B. Eells,
Petitioner.

In the Supreme Court of the State of Kansas. J. W. Hall, Appellee, vs. Charles B. Eells, Appellant. No. 35946.

Motion to Dismiss Appeal.

Comes now J. W. Hall, Appellee, and moves the court for an order dismissing the appeal for the following reasons:

First: That the order of the District Court denying the defendant's (appellant) motion

"to set aside as wholly void the following orders and judgments rendered therein:

1. Temporary injunction filed March 5, 1940.
2. Permanent injunction filed March 15, 1940.
3. Order of contempt and punishment filed April 7, 1941."

is not an appealable order as provided by G. S., 1935, 60-3302 and 60-3303, of the laws of this state.

Second: That all the questions of law involved in this appeal were settled by the Supreme Court of Kansas in the case of *J. W. Hall, Appellee, v. Charles B. Eells, Appellant*, No. 35480, 155 Kan. 307, decided April 11, 1942.

Third: The appeal lacks merit.

Statement of Facts.

On the 23rd day of October, 1941, appellant Charles B. Eells filed a motion in the District Court of Linn County,

Kansas, asking that the above-named orders and judgments made in this case be set aside for the reason that the said orders and judgments were void. The motion was heard by the court on the 4th day of November, 1941, and on the 18th day of November, 1941, the court overruled the motion (C. A. and Brief of Appellee in Case 35480). From the order overruling the motion the defendant appealed to the Supreme Court of Kansas. The Supreme Court affirmed the order of the District Court in overruling the said motion, holding that the orders and judgments asked to be set aside as void were not void. The opinion may be found in *Hall v. Eells*, 155 Kan. 307. No motion for a rehearing was filed and the judgment of the Supreme Court became final.

Disregarding the judgment of the Supreme Court the appellant on the 30th day of March, 1943, filed another motion in the District Court of Linn County, Kansas, asking once more that the orders and judgments hereinbefore mentioned be set aside as being wholly void. In other words appellant asked the District Court of Linn County to reverse the Supreme Court which had held that the said orders and judgments were not void. On the 20th day of April, 1943, the District Court of Linn County overruled the motion and from the order overruling the motion this appeal was taken. If this appeal is allowed this process may well go on for many years. Appellant now attempts to use not only the justice of peace courts, but the Supreme Court to interfere with appellee's peaceable possession of the property involved located in Linn County, Kansas.

**Request to Submit the Case on the Brief of Appellee
Filed in Case No. 35480.**

If the motion to dismiss is overruled the appellee requests the court that he be permitted to submit his case on his brief filed in the case of *Hall v. Eells*, 155 Kan. 307. The question raised in this appeal is the same as the one raised in the last mentioned case and the arguments and authorities set forth in the said brief are applicable to the case at bar.

Hylton Harman,
304 Huron Building,
Kansas City, Kansas,
Attorney for Appellee.

Notice.

To: Charles B. Eells and W. W. Edeburn, his attorney of record:

You are hereby notified that the foregoing motion will be called up for hearing before the Supreme Court of Kansas on the 30th day of September, 1943, at 9:30 A. M., or as soon thereafter as counsel may be heard.

Hylton Harman,
Attorney for Appellee.

J. W. Hall, Appellee, v. Charles B. Eells, Appellant. No. 35946.

Syllabus by the Court.

1. The record in an attempted appeal examined and the appeal dismissed upon grounds stated in the opinion.

Appeal from the Linn district court; Harry W. Fisher, judge. Opinion filed November 6, 1943. Dismissed.

W. W. Edeburn, of LaCygne, was on the briefs for the appellant.

Hylton Harman, of Kansas City, argued the cause for the appellee.

The opinion of the court was delivered by

Wedell, J.: This is an appeal from an order overruling defendant's motion to set aside as void certain orders made against the defendant in the trial of a previous case.

The defendant perfected an appeal to this court from each of those orders in the previous case. The decision of the trial court was affirmed by this court in *Hall v. Eells*, 155 Kan. 307, 124 Pac. 2d 444. No petition for rehearing was filed and the decision has, of course, become final.

The abstract in the instant case contains no specification of errors as required by rule 5 of this court. Furthermore, the abstract contains nothing which can form an adequate basis for the instant appeal or upon which this court could predicate a reversal if the appeal were otherwise properly before us.

The appeal is dismissed.

In the Supreme Court of the State of Kansas. J. W. Hall, appellee, vs. Charles B. Eells, appellant. No. 35946.

Motion to Reinstate.

Comes now Charles B. Eells, appellant in the above captioned case, and moves the court to reinstate said case and amend his abstract by striking out therefrom questions Nos. 2, 4, 6 and 7, disregarding and ignoring all reference thereto and leaving only questions Nos. 1, 3 and 5 to be reviewed and ruled on by the Supreme Court and to further amend said abstract by inserting therein the following:

Specification of Errors Complained Of.

1. The district court erred in granting an injunction to a stranger to the prior action (No. 8961) on which the present action is based. Both parties to the prior action being residents of the state of Missouri, while the plaintiff in the present case is and has been a resident of the state of Kansas the past 30 years.

2. The district court erred in granting an injunction by denying defendant the right to be heard and not requiring plaintiff to show himself entitled to it.

3. The district court erred in punishing defendant for violating a void permanent injunction of which he has not been legally accused.

For the following reasons, to wit:

1. We considered the errors complained of were enumerated and specified in our motion in questions 1 to 7 inclusive as sufficient and as complying with rule 5 since they seemed to us to be quite apparent and that the substance and not the form would be adjudged. We endeavored to make our abstract as concise as possible as the Supreme Court on several occasions has remarked that it dotes on brevity. For the same reason we wished to avoid repetition and was unaware that this technicality would prove fatal in the eyes of the court.

2. We have reproduced in our abstract only such portions of the petitions of the prior action and the present one that have a bearing on question No. 1, and have omitted those parts which are formal and immaterial. The appellee did not challenge the correctness or deficiencies of our abstract.

Our abstract plainly shows that the plaintiffs in the prior action and the present one are not one and the same party.

In reference to question No. 3, as no legal trial was held, and no evidence permitted to be introduced by either party by the then judge, there is no record to be reproduced in our abstract. The official stenographer was not present at the alleged hearing.

Regarding question No. 5, our abstract reproduces only those portions of the citation, affidavit, accusation and the order of punishment for contempt which clearly show that defendant was accused of violating a void and dissolved temporary injunction but punished for violating a void permanent injunction of which he has never been legally accused.

3. The above captioned case should be reinstated and all orders and judgments rendered therein by the district court should be set aside and vacated for the further reason that, in violation of the Federal Constitution and the statutes of the State of Kansas, they deprive the appellant of his property and liberty without due process of law. As yet no court has cited laws or authorities to refute this appellant's claims.

The Fifth Amendment to the Federal Constitution provides that no person shall be deprived of life, liberty, or property, without due process of law. The Fourteenth Amendment extends this prohibition to the States. We believe, therefore, our cause is sufficient to support a review by the Federal Supreme Court, and further because the parties thereto are citizens of different states.

Wherefore, appellant prays that this case be reinstated and amended and that the orders and judgments of the district court be set aside and vacated.

Respectfully submitted,

Charles B. Eells,
appellant.

Copy of above motion served on Hylton Harman, attorney for appellee, by United States mail November 24, 1943.

Charles B. Eells,
appellant.

Denial of Motion to Reinstate.

Office of Clerk Supreme Court.

Topeka, Kansas, December 21, 1943.

Dear sir:

The Motion to reinstate in the case of Hall, appellee v. Eells, appellant No. 35946 is this day denied.

Very respectfully,
E. E. Clark,

Form A

Clerk Supreme Court.

The foregoing and accompanying Abstract of Appellant is a true and correct transcript of the records in above entitled case in the Kansas Supreme Court.

Charles B. Eells,
Petitioner.

Subscribed and sworn to before me this 4th day of March, 1944.

(Seal) Cornelius Murphy.

My Commission Expires April 21, 1944.

